Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 99.

JANE C. HITZ, APPELLANT,

vs.

JOHN STORY JENKS ET AL., APPELLEES.

BRIEF FOR APPELLEES.

STATEMENT OF FACTS

This case is a sequel to the case of Hitz *vs.* Jenks, 123 U. S., 297. As the single point relied upon by the appellant in this court may turn largely upon a question as to the proceedings in the former suit, a summary of them may be useful.

On June 16, 1877, the appellant and her husband conveyed the property in controversy, her separate estate, located at the northeast corner of 9th and G streets N. W., in the city of Washington, and containing about 8,200 square feet, to one Sarah L. Crane, who, on the following day, conveyed the property to Richard W. Tyler, trustee, to secure the repayment of $20,000, money borrowed from William P. Jenks, the ancestor of the appellees, with interest at 8 per

cent. per annum, the then current rate, payable semi-annually. Subsequently the German-American Savings Bank, of which appellant's husband was president, and to which he was largely indebted, failed, and one Benjamin U. Keyser, appointed receiver by the Comptroller of the Currency, and who, in that capacity, had obtained a deed of the property from Sarah L. Crane, filed a bill in equity to establish an alleged lien in favor of the bank, in priority to the mortgage securing Mr. Jenks. To this appeal, besides other parties not concerned in the present litigation, the appellant, Tyler, and Jenks were parties, and among the prayers for relief was one for an injunction against sale of the mortgaged property by Jenks and Tyler under a then outstanding advertisement of sale by them for default in the payment of interest; and on February 21, 1879, the special term granted the injunction prayed "until final hearing of this cause."

On October 21, 1879, appellant filed a cross-bill, alleging that both the lien claimed by the bank and the Jenks encumbrance were the result of a fraudulent conspiracy practiced upon her, imputing, however, neither notice nor want of good faith to Jenks, but praying that her said property might be freed from both encumbrances. The answer of Jenks and Tyler alleged that Jenks was a *bona fide* purchaser for value and without knowledge, notice, or suspicion of the equities set up in the original or the cross bill.

The cause coming on for hearing, the special term on November 28, 1881 (Record, pp. 116, 117), decreed the appellant to be the owner of the property, subject only to an estate by the curtesy in her husband, against which estate only the Jenks encumbrance could be enforced, dissolving the injunction *pendente lite* of February 21, 1879, "so far as it relates to the said interest of John Hitz," and ordering Keyser to account to the court for all rents received by him since the property came into his possession, and to surrender the possession to Richard W. Tyler, whom the decree ap-

pointed receiver to take possession of, rent, and manage the property and apply the rents to the payment of taxes, insurance, and other expenses needed to keep the property in tenantable condition until further order of the court, upon giving bond as such receiver.

Keyser, Jenks, and the appellant, however, uniting in an appeal to the general term from this decree, the court (Record, p. 118) ordered that upon the giving of a bond by Keyser, conditioned for the payment into the registry of the court of the rents and profits of the real property in controversy, the execution of so much of the decree as transferred the property to the receiver therein named should be stayed until final decision, the justice signing this order approving the bond therein referred to, which recited that so much of the decree of November 28, 1881, as related to the collection of the rents and profits of the real property was superseded by the order of December 15, 1881.

The cause came on to be heard in the general term, whose decree of December 11, 1883, will be found at pages 120–122 of the record. As will be seen upon an examination of it, it finds that no equity has been shown "to prevent or delay the execution (or) enforcement" of the deed of trust securing Mr. Jenks, dissolved the injunction *pendente lite* enjoining sale thereunder, reversed the decree of the special term retaining that injunction in respect to the interest and estate claimed by the appellant, required Keyser to account for all rents received by him, both before and subsequently to the decree of the special term, retained the cause for the purpose of allowing the parties to determine the opposing claims of Jenks, Hitz, and Keyser to the rents and profits collected by the latter, and appointed Tyler receiver "until a sale could be made under the said deed of trust, to take possession of the property, collect the rents and profits, and apply them to taxes, insurance and other proper expenses," etc., in terms, however, declaring the decree to be without prejudice to the rights of any party entitled to the reversion of the property

"to redeem or to make claim as such party may be advised, to any balance or portion thereof which, upon a sale under the said deed of trust and the satisfaction of the debt secured thereby, with interest and costs, and of the expenses of the sale, may remain in the hands of the trustees." The eighth paragraph of the decree dismisses the original and supplemental bills, the cross-bill of the appellant and the amendment thereto, except in so far as retained, as above set forth.

From this decree the appellant appealed to this court, giving an appeal bond in the penalty of $3,000, which was about equal to the rents for one year of the property in controversy.

The decree in question was accompanied by an opinion of the court, reported in 2 Mackey, 513, which declared that Tyler, the trustee under the Jenks encumbrance, "should be allowed to proceed to execute his trust. It may be that, after payment of the note to Jenks by sale of the premises, a surplus may remain to be disposed of. It is proper that the trustee be required, in case he makes sale and receives such surplus, to pay the latter into court." At a hearing of the same cause by the same court in July, 1888, it declared that the trustee, Tyler, under the above decree "was authorized by the court to sell the property at private (misprint for public) sale under the deed of trust."

Not only does the court which passed the decree thus declare its purpose and effect, but all the parties at that time appear so to have understood it. The property was advertised for sale by the trustee under the deed of trust in March, 1884, of which the appellant had due notice, and she, by her solicitor, on the 10th day of that month, wrote to the trustee, questioning his right to sell, not upon the grounds that the property was in the possession of the court by its receiver, or that the injunction granted by the special term was still in force, or the retention of the cause by the court for the purposes specified in its decree, or the uncertainty of

the result of the litigation in this court, but solely on the ground that a supersedeas bond had been presented, approved, and filed in the cause (Record, p. 9). At the sale Mr. Jenks became the purchaser for the price of $29,200, which was at the rate of about $3.65 per square foot, and was insufficient by $4,745.73, exclusive of the arrears of taxes, to pay the amount of the incumbrance, appellant having failed to pay taxes, interest, or insurance charges for nearly seven years, and the aggregate of their arrearage then being upwards of $13,300.

Eight months after the sale the appellant, through her solicitor, obtained an order from the court referring the cause to the auditor to report the proper distribution of the rents which had been paid into the registry of the court by Mr. Keyser as the condition of the non-appointment of a receiver by the court at the time of the decree of the special term above mentioned. This order required an accounting by Keyser before the auditor as to all rents which were or might have been collected by him, "as well before the order of December 15, 1881, passed by the special term in this cause, as after said order, *and until the possession of said premises passed out of his hands*," no objection being made to the fact that they had passed out, or that they had been sold. The other claimants objected to the allowance of the usual receiver's commissions to Keyser on the ground that he was a receiver not appointed by the court, but under designation by the Government, and in receipt of an annual compensation for the duties of his said position (Record, p. 126). The auditor allowed the commissions on the ground that collection of rents of real estate did not appear to be included within the ordinary duties of a bank receiver. The main question contested before the auditor, however, was whether the rents in question should be applied to payment of the tax arrearages, and thus lessen the deficiency in the payment of the Jenks encumbrance, or should be paid to the appellant, under the theory that the mortgagor was entitled to the

rents until foreclosure. The auditor inclined to the latter view, except as to the taxes accruing after the decree of the special term and during the time that the rents were being paid into the registry of the court (Record, pp. 128–'9); but, upon exceptions, the general term directed application of the rents to the entire tax arrearage (Keyser *vs.* Hitz, 4 Mackey, 179), from which action the appellant appealed unsuccessfully to this court (Hitz *vs.* Jenks, 123 U. S., 297). The fact of the sale of March 26, 1884, was brought to the attention of both the general term and of this court, and, as above pointed out, the former court, in 4 Mackey, at page 181, declared that Tyler, the trustee, was authorized by that court to sell the property at public sale under the deed of trust, as he had done, and this court, after declaring that the decree of the general term of September 11, 1883, had dismissed both the original and the cross bills in the cause, "save that the cause was retained to take an account of the rents and profits received or which should have been received by Keyser, and to determine the right to those rents and profits, which were claimed by Mrs. Hitz as her separate property, by Jenks as part of the security afforded by the deed of trust to Tyler, and by Keyser under judgments recovered against Hitz" (123 U. S., p. 299), adds:

"When it was afterwards adjudged that * * * the sum obtained for the land at a sale under a power contained in this deed proved insufficient, by more than the whole of the fund in court, to pay the debt of Hitz to Jenks, secured by this deed, it was rightly held that Mrs. Hitz had no right as against Jenks to any part of this fund" (*id.*, pp. 306, 307).

The decision of this court, conclusively terminating the possibility of further question touching any of the issues raised in the case of Keyser against Hitz, was rendered November 14, 1887. Up to that time, if we except the dubiously stated objection by appellant, through her counsel, of March 10, 1884, based solely upon the fact that she

had filed a supersedeas bond (Record, p. 9), there had been no intimation of any question by the appellant as to the entire validity of the sale, nor of any dissatisfaction upon her part with it. Not only so, but the reference obtained by her to the auditor, the contest by her before that officer, before the general term, and before this court, was whether the rents in the registry of the court should be applied to the deficiency of the Jenks indebtedness remaining *after the sale* of the property, or should be paid to her under the rule affirmed in Teel *vs.* Walker, 111 U. S., 242, that a mortgagee is not entitled to the rents and profits until lawfully put into possession of the land.

Not only so, but three years more were permitted by her to elapse, when, in November, 1890, she filed the bill in this cause, alleging the sale to have been invalid upon a variety of grounds, among which the principal were the alleged fact that the property at the time of the sale was in the possession of a receiver appointed by the court; that her appeal from the decree of the general term of December 11, 1883, and her supersedeas bond given in that connection suspended the right of sale; that the injunction *pendente lite* given by the special term was revived or continued in force by her appeal and supersedeas; that the price realized was grossly inadequate; that the terms of sale were all cash instead of partly cash and partly on time, and the like.

The necessity of explaining her delay in raising the objections was attempted to be met by setting forth that, in addition to the litigation in the controversy with Keyser over the property now in suit, she had been engaged in one other suit over her alleged statutory liability as a stockholder of the German-American Savings Bank; that the former of these suits had not been finally closed, a statement which, as explained in the testimony, amounted to no more than that the mandate of this court had not been promptly sent down to the lower court, and that some trivial question of costs had not been determined there, and that the em-

barrassed condition of her estate had obliged her to be very economical (Record, p. 11). The answer of the present appellees, William P. Jenks, their testator, having died in 1886, denies that the reasons thus alleged for delay "are either true in fact or sufficient in law," avers that the complainant is possessed of large wealth, and that "the causes set forth by her have not induced the said delay as claimed." Upon the issue thus presented upon the question of laches the complainant made no effort to sustain the allegations of her bill by any proof beyond the fact that she was "very seriously annoyed" by the litigation (Record, p. 75); that the mandate of this court, after the final and complete disposition of all the questions in the case by the opinion rendered in 123 U. S., at p. 297, on November 14, 1887, had not been filed in the court below until February 11, 1889 (Record, pp. 155, '6), and that on June 16, 1890, a taxation of costs in the cases was ordered.

POINTS AND AUTHORITIES.

I.

Upon the question, very earnestly insisted upon below, whether the injunction *pendente lite* granted by the court below in special term was revived or continued in force by the appeal from the decree of the general term of December 11, 1883, it was urged, although this court had repeatedly declared that an appeal from a decree granting, refusing, or dissolving an injunction does not disturb its operative effect (Slaughter-house cases, 10 Wall., 297; Hovey *vs.* McDonald, 109 U. S., pp. 161, 162; Leonard *vs.* Ozark Land Co., 115 U. S., 465; Knox Co. *vs.* Harshman, 132 U. S., 14), yet that the application of this rule by this court had been confined to appeals from orders granting injunctions, or refusing them, and that the case of an appeal from an order dissolving an injunction had never been passed upon by it, the po-

sition of the appellant apparently being that the decisions in these cases were only applicable to the particular or practical point presented by the appeals in them; or, in other words, that the *principle* recognized and adopted as the basis of the decision was *obiter*, and only the application of that principle in the particular case is binding as authority. This point, however, we are advised by the appellant's counsel, will not be presented here, and therefore need not be further discussed.

II.

The proposition that a mortgagee whose encumbrance was for so many years in default that the arrears of interest, taxes, and insurance charges aggregated nearly 70 per cent. of the principal of the indebtedness might be postponed in the matter of enforcing his mortgage, and that an injunction *pendente lite* which the court below had dissolved and refused could thus be in effect revived against him by the act of the mortgagor in taking an unfounded appeal, and thus creating the uncertainty of litigation set forth in the bill as a reason why the foreclosure sale was invalid, is, it is believed, equally untenable. Precisely the same point was presented, among others, in the case of Wheeler *vs.* McBlair *et al.*, in which case, there being litigation to enjoin foreclosure, of which express notice was given on behalf of the appellant at the time of the sale, the court below said:

"The only conduct at the sale likely to prevent full competition among bidders was that of complainant's husband and agent, who gave written notice of the invalidity of the sale and of the pending litigation. If this protest, which is probable, caused the property to bring less than it might otherwise have done, the complainant has herself to blame for it" (5 D. C. App., 375, 383).

The decree was affirmed in this court in 172 U. S., 643, without an accompanying opinion, the correctness of the

rulings below being evidently regarded as too plain to require discussion.

This proposition also, we are advised, will not be discussed here by or on behalf of the appellant, and may therefore be submitted without further references.

III.

The allegation that the price realized at the sale was inadequate not only failed of proof in the testimony, but was conclusively disproved. The witnesses in support of this claim, five in number, were, as the Court of Appeals in its opinion declares, men of very limited experience in real estate, no one of them being able to corroborate his estimate by instancing any sale or sales whatsoever in the neighborhood and at all contemporaneous with the sale in question, while, on the other hand, sixteen witnesses, including the most prominent real-estate agents in the city, testify that the price realized was a full and fair price for the property at the time it was made, and substantiate their opinions by citing numerous sales in the vicinity before, contemporaneous with, and shortly subsequent to the sale in question, showing that many properties of equal and of greater desirability in the immediate vicinity were sold both before and after at prices even more favorable to the purchaser. Three persons of ample means and without any concert among themselves were present for the purpose of purchasing the property, all of them desisting because it went beyond what they considered a proper or desirable price. As the Court of Appeals declares in its opinion, the preponderance of testimony upon this point is simply overwhelming in favor of the appellees; and this point also, we are advised by counsel for the appellant, will not be pressed here.

IV.

The claim that it was unreasonable and improper to offer the property for sale upon terms of payment in cash of the entire purchase-money would seem to be sufficiently answered under the preceding head. If the price for which the sale was made was the full and liberal market price of the property at the time, the terms proposed, if not justified by the result, at least form no ground of valid objection. The mortgagee had for years been kept out of both his principal and his interest until the arrearage of the latter alone aggregated nearly $9,000, and if to this aggregate of principal and interest there had been added the arrears of taxes and insurance charges, and if the property had been sold upon terms of one-third cash and the balance in one and two years, as was insisted should have been done, the mortgagee, after the sale, would have had a larger incumbrance for the deferred purchase-money and a smaller margin of security than the testimony shows he was willing to accept originally.

This point, however, like the preceding ones, it is stated, will not be argued here.

V.

The only objection to the decree below dismissing the appellant's bill, which is presented by the assignment of errors and which, we are informed, will be the only one urged here, is that the foreclosure sale of the property in controversy was invalid upon the ground that the property then was, according to the appellant's claim, in the custody of a receiver appointed by the supreme court of the District of Columbia. This objection is presented in several different aspects, namely: (1) That the sale was absolutely void, because at the time it was made the property was in possession of the supreme court through its receiver; (2) that

the court did not direct or authorize sale of the property while in the possession of its receiver, and (3) that if it did attempt to authorize sale of the property while in the receiver's hands such attempt was superseded by the appeal and supersedeas bond.

1.

The objection, in its first and principal form, presents both a question of fact and a question of law, namely: First, is it true that the property in controversy was in the possession of the court through its receiver at the time of the sale? and, secondly, if so, did that fact render the sale either void or voidable under the surrounding circumstances and subsequent history of the case?

In the first place, it is respectfully submitted that appellant is in error in her claim that the property was at any time in the possession of the court or of its receiver, at least under the theory urged by her as to the effect of her appeal and supersedeas bond.

It is true that when the case of Hitz *vs.* Jenks was before this court the appellee, Keyser, was treated as though he was in possession of the rents then in controversy, in the capacity of a receiver appointed by the court. This was true enough, in legal effect, in so far as the question then before the court was concerned. The court had practically impounded the rents and required them to be paid into its registry. They were not really in Keyser's hands at all, but in the registry of the court, placed there under its compulsory requirement as the only condition under which Keyser, who claimed to be the owner of the property, would be allowed to retain possession of it, and but for whose acceptance of which condition the rents would have been in the hands of a receiver; and, as stated, it was competent enough for the purposes of the suit as then before the court to treat them as in a receiver's hands. Here, how-

ever, the question is differently presented; not merely the rents, but the property itself, it is now contended, was in the hands of a receiver, and the question is raised, not, as then, for the purpose of determining how they should equitably be applied, but whether a defeated mortgagor, who for many years had involved the mortgagee in groundless litigation and delayed him in the collection of his debt, to his great loss and injury, may through the instrumentality of such a claim technically defeat a foreclosure sale, made nearly seventeen years go, for the full and fair value of the property at the time, and thereby to secure to herself the benefit of a subsequent and then unanticipated rise in price which has quintupled the then value of the property. Under these circumstances, it is submitted, it is not only competent, but right, to inquire whether the property in question was, in fact, in the hands of a receiver at all at the time of the sale, as alleged.

As appears from the foregoing summary of the facts and from the record, Keyser came into the possession of this property through a conveyance by Sarah L. Crane to him as receiver of the German-American Savings Bank, appointed by the Comptroller of the Currency, the bank being a very large creditor of Mr. Hitz, its former president. It was in this capacity as the grantee and owner of the property that he, Keyser, obtained possession; and he retained it in this capacity down to the decree of the special term of November 28, 1881. This decree, as originally passed, required him to surrender possession to Richard W. Tyler, thereby appointed receiver; but by December 15, 1881, a modifying order was passed, not appointing Keyser receiver, but permitting him to remain in possession as he had been before, on terms of filing a bond, as receiver of the German-American Savings Bank, in the penalty of $5,000, and of depositing the thereafter-accruing rents collected by him into the registry of the court. He had at this time appealed from the decree of November 28, and was therefore still insisting

upon his right to the rents as owner; but, to avoid transfer of possession to a receiver, he agreed to deposit the rents in the registry of the court, and to file his bond as receiver of the bank, in which capacity he claimed the property, conditioned for his faithful compliance with the order.

After this order of December 15, 1881, the position of Keyser continued to be that of one in possession of land, claiming to be its owner, but consenting to turn over its rents as collected by him into the registry of the court, subject to the result of his appeal from the decree of the special term denying his ownership; and this remained his attitude and position until the decree of the general term of December 11, 1883. Indeed, this view is conceded by the bill in this cause, which alleges, in paragraph 7 (Record, pp. 4, 5), that "Keyser took possession of the property as receiver of the bank, and that the decree of the special term appointing Tyler receiver was modified by special order permitting Keyser to continue in possession on terms of depositing his collections into the registry of the court monthly."

Indeed, the assignment of errors in this cause is based upon the claim, not that Keyser was a receiver of the court or that the court was in possession of the property at any time through him, but that the property was in the custody *of Tyler*, "as a receiver appointed by the supreme court of the District of Columbia in general term by the decree of December 11, 1883," which is the identical decree from which the appellant appealed to this court, and which decree, she claims, was superseded and rendered nugatory pending the appeal by virtue of her supersedeas bond, and this is the position taken by her in this cause, her bill, in the eighth paragraph (Record, p. 7), averring in terms that her appealed bond rendered it unlawful for Keyser to deliver possession to any one.

Of course, if appellant's contention under this claim of her bill and under her third assignment of error, discussed at pages 25–30 of her brief, that her appeal and supersedeas

bond rendered the decree of December 11, 1883, nugatory, it must follow inevitably that Tyler's appointment as receiver was superseded or suspended by that appeal and never took effect at all.

But, on the other hand, if the appellant may insist that her claims in this regard are untenable, and that the decree of December 11, 1883, was operative and effective, notwithstanding her appeal and supersedeas bond, is it true that by that decree the supreme court of the District of Columbia took the property into its possession, through its receiver, in such manner as to interfere with or prevent a sale under the deed of trust? This result is urged upon the authority of certain cases to the general effect that property may not be sold while in the hands of the court or of its receiver and of certain general statements in the text books that a formal order is necessary to the discharge of a receiver.

Of course, these principles and authorities are in point only in cases where the property is taken by the court into its possession or into that of its receiver, under such circumstances as indicate its purpose to preserve it from sale or other disposition while so in its possession and pending decision by it of the questions involved in the suit. The rule is simply and purely an ancillary one, for the purpose of preserving the property until the court has determined to whom it belongs, so that it may then award or distribute it accordingly and protect those in whose favor it decides the rights which it adjudicates them entitled to enjoy. The present seems to be the first attempt to extend the rule beyond these purposes and to make it the basis of an entirely independent suit by one who was adjudicated not entitled to any of the rights asserted by her in the suit in which it is claimed the receiver was appointed.

In the first place, then, was the property in controversy taken into the possession of the court at all, or placed in that of its receiver with the intent or for the purpose of preserving it from sale, or preserving it for distribution by the court

among the parties thereafter to be adjudged by it entitled to the same?

For answer to this inquiry, we have the right to look to four sources of enlightenment, namely, to the decree itself, to the opinion of the court accompanying it, to the contemporaneous understanding of all the parties in interest as manifested by their conduct, and to the subsequent construction and action of the court which passed it.

With respect to the decree itself (Record, pp. 120–122), as before pointed out, it declares that there is "no equity shown in this cause to prevent or delay the execution or enforcement of the deed of trust." It appoints Tyler receiver only "until a sale shall be made under the said deed of trust." It declares that the parties in interest shall be left at liberty "to redeem or to make claim, as such party may be advised, to any balance or portion thereof" which might remain in the hands of the trustee after the sale and satisfaction of the debt secured, with interest, costs, and the expenses of the sale, and it thereupon dismisses both the original and the cross-bills entirely, except for the purpose of allowing the several claimants to the rents and profits in the registry of the court, and to any surplus remaining after the sale, to litigate their claims.

With respect to the opinion accompanying the decree, which is a proper source of reference to ascertain its intent and meaning (Baker *vs.* Cummings, 181 U. S., 117), we find that the court, in passing the decree, declared, specifically, "that the deed of Mrs. Hitz and her husband to Crane and the deed of Crane in trust to Tyler to secure Jenks are valid, *and that the trustee in the latter should be allowed to proceed to execute his trust*" (Keyser *vs.* Hitz, 2 Mackey, 526).

With respect to the contemporaneous understanding of the parties, all of whom were represented by able counsel, we find that Tyler and Jenks understood that the court had given them leave to proceed, as is evidenced by their advertisement and sale; that Mr. Keyser and his coun-

sel also were of this opinion, as is evidenced by their acquiescence and inaction, and that the present appellant and her counsel were of that opinion, as evidenced by their like acquiescence and inaction and by their letter to Tyler of March 10, 1884, suggesting as the only objection or obstacle to the sale the fact that she had given a supersedeas bond (Record, p. 9). And that this was the understanding at the time of all the parties is further evidenced by the fact that, the sale having resulted in a deficiency, all of them—Keyser, the appellant, and Mr. Jenks—litigated the question before the auditor and before the general term whether the rents and profits in the registry of the court should be applied to this deficiency or be allowed to go to the other claimants, this question being further pursued, so far as the appellant was concerned, to this court, where her contention was that, under the doctrine of Teel *vs.* Walker, Jenks, the mortgagee, was not entitled to the rents and profits accruing before he had been lawfully put into possession of the land.

With respect to further manifestation by the court of the intention and purpose of its decree, it declares in terms, in Keyser *vs.* Hitz, 4 Mackey, page 181, that Mr. Jenks had been "authorized by the court to sell the property at public sale under the deed of trust," two of the same justices sitting at this time as when the opinion was rendered in 2 Mackey, 473, including the justice who delivered the opinion.

In the light of these facts and circumstances, we submit, it is perfectly plain that the decree of December 11, 1883, appointed Tyler receiver only "until a sale shall be made under the said deed of trust;" that this, its decree, was made contemporaneously with and in pursuance of its opinion that he "should be allowed to proceed to execute his trust;" that the court in and by its said action intended, as it declares in 4 Mackey was its purpose, to authorize the trustee to proceed to sell under the deed of trust, and that all the parties in interest so understood the matter at

the time and acquiesced in that construction of the decree. Had the appellant then conceived that the injunction was in force, or that the property was in the possession of the court's receiver in any sense which rendered a sale improper, or that her supersedeas bond really superseded the trustee's right to sell, it was her right and her duty, by a petition or other proceeding in the cause, to bring the matter to the attention of the court at the time for its action, and not to stand by in apparent acquiescence until the sale had been made and for seven years afterwards, when the property had quintupled in value, before raising the objection.

In Virginia Iron Co. *vs.* Bristol Manufacturing Co., 88 Fed. Rep., 137, cited by the appellant, the court declares that where an injunction, attachment, or rule to show cause becomes necessary to the protection of the receiver's possession, such a proceeding in the cause as will call the attention of the court to the fact that its jurisdiction is being invaded is the necessary and proper course.

To apply another test:

All the authorities denying the validity of a sale made when the property sold is in the possession of the court's receiver declare it to be a contempt of court, and that the offending party is punishable for the contempt. If, therefore, Tyler's sale falls under the principle of these authorities, his conduct also falls under it, and he was guilty of a contempt. Could he by any possibility have been adjudged in contempt by the court which appointed him receiver only until he should make sale of the property under the trust, which declared by the very decree so appointing him that he should not be delayed as trustee in the enforcement of the deed of trust, which declared in its accompanying opinion that he should be allowed to proceed to foreclosure under it, and which declared in its opinion, when the case next came before it, in 4 Mackey, that it itself had authorized him to proceed to sell at public sale under that instrument?

We respectfully submit, then, in the first place, that it was

neither the intention nor the effect of the decree of December 11, 1883, to place a receiver in charge of the property in such manner as to interfere with or prevent its sale under the deed of trust, and that therefore the sole ground upon which the appellant is driven to rest her case in this court is wholly untenable.

But, in the second place, it is further submitted that the rule invoked by the appellant, even in cases to which it applies, has no application in a collateral, wholly independent suit, in which it is neither needed nor appropriate for the protection or enforcement of the rights of any party ascertained or adjudicated in the case in which the receiver was appointed. The rule in question rests for its foundation and depends for its existence upon the reason that it is necessary to the jurisdiction of the court in the case in which the appointment is made, and to enable it to preserve the property so taken into its possession for the purpose of administering it according to the rights of the parties as they may be adjudicated in that cause. It has never been held in any case that a stranger to the litigation or a defeated litigant claiming no rights under its results can invoke the rule in a collateral, independent suit, brought neither to enforce nor attack any right adjudged by or derived from the former proceeding.

No one of the authorities cited on behalf of the appellant sustains or gives any countenance to the application of the rule to such a case as hers.

In Wiswall *vs.* Sampson, 14 How., 52, the court declared the property to be "a fund in court, to abide the event of the litigation"—*i. e., that* litigation; and that, in order to enable the court to effect its duty of seeing that the fund is applied in conformity with the rights of the parties, it must administer the fund "independently of any rights acquired by third persons, *pending the litigation. Otherwise, the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless.*" And at the same page (66) the court

places the matter virtually upon the basis of *lis pendens*, binding the title from the filing of the bill, "and any purchaser, *pendente lite*, even for a valuable consideration, comes in at his peril." But the pendency of some *former* suit can never be availed of by the complainant in a later, independent, and wholly different proceeding.

In this case of Wiswall *vs.* Sampson, the proceeding was ejectment, and, therefore, in a technical sense, collateral. But the circumstances were that, Wiswall having filed his bill claiming priority for his judgment, the court having taken possession by its receiver, and the chancery suit ending in a decree in Wiswall's favor, effectuated by sale of the property in that suit to him, it was attempted to defeat the effect of that decree by setting up in ejectment a marshal's sale under a judgment at law to one Dargan, pending the receivership, the effect of which execution sale, if allowed, would have been to take away the jurisdiction of the chancery court for all practical purposes, and to cause the whole property or fund to pass "out of its hands before the final decree, and the litigation to become fruitless."

The doctrine of this case is declared by this court in Heidritter *vs.* St. Elizabeth Oil Cloth Co., 112 U. S., at p. 304, to be that the jurisdiction of one court over property in its possession cannot be violated by proceedings in another court prosecuted to judgment and sale without the permission or sanction of the former tribunal, and to this effect only, in principle, are all the other cases cited by appellant upon this latter case, namely, Peale *vs.* Phipps, 14 How., 374, 375; Hagan *vs.* Lucas, 10 Pet., 400; Williams *vs.* Benedict, 8 How., 107; Pulliam *vs.* Osborne, 17 How., 471; Taylor *vs.* Carryl, 20 How., 583; Yonley *vs.* Lavender, 21 Wall., 276; People's Bank *vs.* Calhoun, 102 U. S., 256; Barton *vs.* Barbour, 104 U. S., 126; Covell *vs.* Heyman, 111 U. S., 176; and to this effect only are also the following other citations in appellant's brief, namely, Walling *vs.* Miller, 108 N. Y., 172, 177; Russell *vs.* Railway Co., 68 Tex.,

652; Gay *vs.* Brierfield, 94 Ala., 310; Dugger *vs.* Collins, 69 Ala. 330.

McLaughlin *vs.* Janney, 6 Gratt., 609, is to the effect that officers proceeding to execute a decree after an appeal therefrom duly taken are guilty of a contempt of the appellate court, and that their acts are null and void "as to the rights of the parties to the appeal."

In Day *vs.* Postal Telegraph Co., 66 Md., 354, also, the question arises in the same, not in a collateral suit, and the court, at pages 368, 369, places its decision upon the ground that the court must "keep a strict hand over the property in the hands of a receiver * * * in order to preserve entire jurisdiction over the whole matter and to do that which is just *in the cause* between the parties.

With respect to the alleged necessity of a formal order to discharge to receiver, the rule is thus laid down in Beach on Receivers, at section 796:

"The functions of a receiver terminate with a judgment adverse to the party who procured his appointment although his *character* as receiver may continue for the purpose of rendering his account and until he is by order discharged from his trust. * * * The dismissal of the action does not discharge the receiver from accountability to the court which appointed him."

Upon these principles and authorities we further submit, therefore, that the rule making invalid any sale of property in the hands of a receiver of the court, and without its leave, is for the purpose of preserving its jurisdiction and of making effective its adjudications *in that* suit, and that it has no application to a new and independent suit, seeking neither to enforce nor in any manner to affect any right adjudicated or established in the former suit.

2.

If we are correct in either of the foregoing propositions namely, that the receivership created by the decree of December 11, 1883, was a receivership to continue only until sale by the trustee, the latter being left free to make such sale whenever he chose to do so; and that, independently of this view, the rule rendering invalid sales of property in the possession of a receiver without leave of the court which appointed him is an invalidity applicable only to that suit in the protection of rights adjudicated or established therein, then it is, pehaps, superfluous to consider any other of the questions in the case; and, indeed, the proposition discussed in appellant's brief, under the second assignment of error, denying that the decree of December 11, 1883, authorized or permitted Tylor to make the sale, has been already considered in connection with the preceding assignment of error.

The concluding point stated under the appellant's second proposition, at page 24 of her brief, to the effect that "as long as the property was in the hands of the receiver Mrs. Hitz could neither sell nor mortgage it for the purpose of raising money to pay the debt due Jenks," while not perhaps material to the legal questions here involved, is singular. The fact that the property was placed in the hands of a receiver to collect the rents until a sale was made no more interfered with a new mortgage or a sale of her interest by Mrs. Hitz than a decree in a foreclosure suit appointing trustees to sell, ties the hands of the mortgagor, or prevents him from effecting a new mortgage, or from making a sale of the property for the purpose of providing in these ways for the mortgage debt at any time before the foreclosure sale. If Mrs. Hitz had found a purchaser at a price satisfactory to herself and sufficient to pay off the claim of Jenks, or if she had negotiated a new loan sufficient to pay off the Jenks mortgage, neither her then nor her present counsel would

have found any legal difficulties or obstacles to the accomplishment of these purposes to which they would not have been readily equal.

3.

The third assignment of error is based upon the claim that—

"If the decree of December 11, 1883, did authorize or permit Tyler, as trustee, to sell the property which he held as receiver, the superseding of that decree rendered such authorization or permission nugatory, and the sale made under it was absolutely void."

It is a little difficult to comprehend appellant's position in this regard from any standpoint.

As above pointed out, there never was any appointment of a receiver in this case prior to December 11, 1883. All that stood in the way of a foreclosure sale up to that date was the injunction *pendente lite*, the dissolution of which by the decree of December 11, 1883, it is no longer claimed was superseded by the appeal.

But if there had been such an appointment of a receiver prior to December 11, 1883, as to interfere with or prevent sale up to that time, and if the decree of December 11 abrogated that receivership in so far as respects interference by it with a foreclosure sale, it would not be true that the court was without power to pass such an order, or that its order to this effect would have been suspended or rendered nugatory by the appeal.

This precise point was before this court in Hovey *vs.* McDonald, 109 U. S., pp. 160–162. In that case a receiver had been appointed by the court to take possession of a fund and had reduced it into his possession. At the hearing the court there, as here, dismissed the bill, and it further directed the receiver to pay over the money to one of the claimants, from which decree an appeal was noted, and

within the prescribed time perfected by a supersedeas bond. The receiver, nevertheless, paid over the fund after the appeal had been noted and without awaiting the time allowed for the perfection of the appeal. This court, after expressing some doubt whether, under the laws of the District of Columbia, the supersedeas became effective until the bond had been actually given, nevertheless placed its decision upon the ground that the rules respecting supersedeas of execution have no application to such matters as were involved in that case, and that, in addition to superseding the order or decree, it was essential to obtain a special order of allowance for the continuance of the injunction, or the like, if the property or fund was to be retained or preserved by continuation of the receivership.

In the third place, as has been before pointed out, the proposition now being considered presents the incongruity of claiming that an appeal and supersedeas of the very decree appointing a receiver continued that receiver in existence, and simply deprived him of the power, in his capacity of trustee, which the decree of his appointment reserved to him.

The authorities cited in support of this proposition have been examined with a degree of care justified by the eminence of opposing counsel, but which, we must confess, seem to have no bearing on the case in hand.

Goddard *vs.* Ordway, 94 U. S., 672, is distinguishable in a variety of particulars.

In the first place, the one contention in that case was as to the disposition to be made of the fund in the possession of the receiver. An order to pay the money to the party whom the court below had decreed entitled to it would have executed the decree and disposed of the fund, leaving the appellate court without jurisdiction, and rendering any decree which it might thereafter make "fruitless." No analogy to these conditions is presented by the case at bar. The court below did continue the receiver for the purpose

of preserving all property in controversy which could be dissipated or escape the jurisdiction and distributive powers of the appellate tribunal, and simply removed its staying hand from the right of the trustee to execute his trust. A reversal by this court of the decree below would have found the realty intact and subject to its decree.

In the second place, it was not claimed in Goddard *v.* Ordway that the supersedeas should have the effect of continuing a receivership which had been vacated by the decree appealed from. The decree below, in fact, had not vacated it, but the court below was applied to, after appeal taken and supersedeas bond given, to go further and to execute its decree by enforcing payment of the fund to the litigant in whose favor it had decided. As this court say in the opinion:

"The only execution there could be of the decree below was the collection of the costs and the delivery to the defendant of the fund in court, which is the subject-matter of the litigation. To that end, *a further order* of the court was asked; but such an order would be in aid of the execution of the decree which has been stayed, *and consequently* beyond the power of the court to make until the appeal is disposed of."

In Goddard *vs.* Ordway, as is shown by the record of that case in this court, and as is referred to in the opinion, the appellant had pursued what Hovey *vs.* McDonald and the other authorities above cited declare to be the proper course by obtaining from the court a restraining order, in effect continuing the receivership and preserving the fund until the court's further order.

It is still further to be noted that in Goddard *vs.* Ordway the question arose in the cause, and was for the purpose of preserving the jurisdiction and giving effect to the ultimate decree of the court in that cause, not, as here, in an effort to preserve the title of the defeated litigant and enable her to

assert that title in a new litigation not begun until seven years afterwards, and because of the greatly enhanced value of the property.

Even if the trustee's sale had been made while the property was in the hands of a receiver, through misconstruction of the effect of the decree through inadvertence and without the court's leave, such fact was without any materiality in the cause, in view of the ultimate decision therein. In the final decision of Goddard *vs.* Ordway, 101 U. S., 745, 751, 752, the court recognizes the principle that a decree is not to be reversed " because of what was, undert he circumstances, an immaterial departure from technical rules (*Alis vs. Insurance Company*, 97 U. S., 144)."

If any further consideration were necessary in respect to Goddard *vs.* Ordway, the construction placed upon that decision by appellant, if correct, would render it directly antagonistic to the carefully considered opinion of this court directly upon the point, in Hovey *vs.* McDonald, 109 U. S., pp. 159–161, above referred to.

Draper *vs.* Davis, 102 U. S., 370, did not present any question as to receivers, but simply the question whether the lower court, after a supersedeas bond had been approved by one of its justices and filed, could require a further bond of the appellant and direct execution upon his failure to comply with such requirement. The only ruling by this court was that the power of the justice over the appeal was exhausted when he approved the bond and signed the citation.

The *Rio Grande*, 23 Wall., 458, was a libel in admiralty for repairs, in which class of proceedings "jurisdiction of the *res* is obtained by seizure under process of the court." An order for release of the vessel from seizure, improvidently made pending the perfecting of an appeal from the decree of the district court, was held not to defeat the jurisdiction of the appellate or circuit court, although executed; that an actual and continuous possession of the *res* is not re-

quired to sustain the jurisdiction; that an accidental or fraudulent or improper removal of the vessel from the custody of the marshal did not destroy the jurisdiction, and that the order for its restoration "was in direct violation of the statute regarding appeals, and did not operate to destroy the jurisdiction of the court." This question, namely, whether the jurisdiction of the appellate court had been destroyed by the release of the vessel under the circumstances, was the only point involved or decided in reference to the subject now under consideration. The question whether an appeal in equity from a decree vacating the appointment of a receiver, either wholly or to the extent of no longer preventing sale, superseded such vacation was in no manner involved or presented.

The case of Grant *vs.* Phœnix Insurance Co., 121 U. S., 108, also decides nothing which is pertinent here. But the same case, reported in the same volume, at pages 105, 117, decides that interlocutory or other orders in regard to receivers are not superseded by an appeal to this court, although, as the report of the same case at page 118 shows, that appeal was accompanied by a supersedeas bond.

Krippendorf *vs.* Hyde, 110 U. S., 276, is apparently without any analogy to the case at bar, however remote. The only expression in the opinion which can be considered as bearing upon it is the following: "The grounds of this procedure," *i. e.*, that of admitting a stranger to an attachment or other suit in which the court has acquired possession of property, to intervene *pro inter esse suo*, "are the duty of the court to prevent its process from being abused to the injury of third persons, and to protect its officers and its own custody of property in their possession, so as to defend and preserve its jurisdiction, for no one is allowed to question or disturb that possession except by leave of the court." But, in the present case, neither the courts below nor the appellees here have denied this power. Neither the jurisdiction of the court in the former case, nor the possession of its officers, nor the

rights of any one claiming under its decree, is either antagonized or questioned by the decree here appealed from or by the appellees.

In re Tyler, 149 U. S., 164, 181, is to similar effect, declaring it a contempt of court to interfere with its possession without its leave; nor is Pittsburg Railway *vs.* Loan and Trust Co., 172 U. S., 493, 513, nearer in point.

No authority is cited, and none can be, that a litigant in whose favor no right has been established by the decree or judgment in a former suit, or one all of whose contentions have been decided in such suit adversely to him, may invoke the rule under consideration in a wholly different litigation, initiated long subsequently and for a purpose such as is here contended for.

In Bronson *vs.* La Crosse R. R. Co., 1 Wall., 405, also it is only necessary to examine the facts of the case to observe its entire want of applicability here. The question there was whether the act of March 3, 1863, empowering United States district courts in the eighth circuit to issue final process or to use their powers and process to enforce their judgments and decrees in all cases in which they had rendered final judgment prior to the act of July 16, 1862, authorized those courts to exercise such powers in the enforcement of their interlocutory judgments or decrees or restricted the exercise of such powers to the enforcement of such as were final. The district court for the district of Wisconsin having adopted the former view, and having passed an order based upon that view, from which an appeal had been taken and a supersedeas bond given, this court held simply that such appeal superseded the order. The fact that the particular order appealed from was one directing a receiver to release a part of the property which was in his possession was simply an accidental circumstance, in no way entering into the consideration or disposition of the case, the point decided being that the lower court was without power to pass any order of any kind in the case under the act in

question, and that any order which it assumed to pass would be superseded by an appeal and appropriate bond.

That an appeal, though accompanied by a supersedeas bond, from an order vacating a receivership does not continue in office the receiver or preserve the fund in his hands, as has been stated, was directly decided by this court in Hovey *vs.* McDonald, 109 U. S., pp. 160–162, which decision has never since been either overruled or modified, rendering it unnecessary to cite decisions of the several State courts to like effect, of which decisions, however, *In re* Real Estate Associates, 58 Cal., 356; Swing *vs.* Dennis, 24 Ohio St., 1, are examples.

Ferguson *vs.* Dent, 29 Fed. Rep., 9, 10, cited by appellant, holds the rule as to the vacating of appeals and supersedeas bonds upon injunctions granted, denied, or dissolved, as laid down in the Slaughter-house cases, Hovey *vs.* McDonald, etc., applies equally to receivers, and that a supersedeas bond, though free from irregularity or defects, will not supersede the directions of the final decree concerning the receiver, be they what they may. In that case a bond intended to be a supersedeas having been defectively drawn and the court being applied to to enforce its decree discharging the receivers for that reason, it refused to do so upon the ground indicated in Hovey *vs.* McDonald, namely, that the matter of continuing or not continuing in force injunctions or receiverships pending an appeal is a matter resting within the discretion of the court, requiring its affirmative action, wholly independently of the existence or non-existence of a supersedeas bond, the function of the latter being only to supersede execution.

VI.

AFFIRMATIVE DEFENSES.

As will be seen upon examination of the opinion of the Court of Appeals, printed in the record, it was argued there on behalf of appellees that the appellant was concluded upon the questions sought to be raised by her bill in this cause by the litigation of certain questions in the former suit and the adjudication of them there, and that she was further precluded from maintaining her present suit by her laches in permitting the sale to go unquestioned for nearly seven years, and until property, which, as established by the record in this cause, had been well sold at $29,200, had enhanced in value until it was then worth, as alleged in the bill, nearly or quite $200,000, and worth now, according to her brief, not less than $150,000. These questions, however, of *res judicata* and laches, which the Court of Appeals thought it unnecessary to discuss, in view of its decision that the sale of March 26, 1884, was made pursuant to the purpose and intention of the court's decree of December 11, 1883, and was not a violation of the possession of the receiver or a contempt of court, will be very briefly considered here.

1.

RES JUDICATA.

The order for reference for an accounting and distribution of the funds in the hands of Keyser and in the registry of the court was made November 13, 1884, on the motion of the appellant's solicitor (Record, p. 124), six months after the sale. At the hearing before the auditor the deed from Tyler to Caldwell, the purchaser at the sale, was introduced in evidence and filed by her, through her solicitor (Record,

p. 329), without any intimation of objection to the sale. The litigation thereafter prosecuted by the appellant for nearly three years was over the question whether those moneys should be applied to the deficiency in the mortgage debt, which the proceeds of the foreclosure sale had been inadequate to pay, or should be received by her on the ground that the mortgagee was not entitled to the rents until lawfully put into possession of the mortgaged property. The former of these contentions was established by the opinion and decree of this court in the cause, in 123 U. S., at p. 306, in the language following:

"When it was afterwards adjudged that the first deed of trust thereby secured, which Keyser's original bill sought to enforce, had been released and discharged, and that the second deed of trust was valid as against Mrs. Hitz, and the sum obtained for the land *at a sale under the power contained in this deed* proved insufficient, by more than the whole of the fund in court, to pay the debt of Hitz to Jenks, secured by this deed, it was rightly held that Mrs. Hitz had no right as against Jenks to any part of this fund."

See, also, 4 Mackey, 179, 185.

This, we submit, is an adjudication necessarily involving the fact of sale. Indeed, the position and proposition contended for by the appellant herself before the general term and before this court in respect to these rents was a clear assertion by her in that case of the fact that there had been a sale and a submission to the court of rights claimed by her involved therein. As above pointed out, the very evidence of the fact of sale, namely, the deed from Tyler to Caldwell, was introduced into evidence and filed by her solicitor, and the rents and profits to the date of such sale were claimed by her on the ground that this sale for the first time placed Jenks in a position to claim any rents and profits of the property.

Her present position, that there never was any sale, is irreconcilably inconsistent with the position occupied by her

before the general term and before this court for nearly four years after the sale, and is inadmissible.

Davis *vs.* Wakelee, 156 U. S., 680, 690, 691, and citations.

Brooks *vs.* Laurent, 98 Fed. Rep., 647.

2.

LACHES.

Upon this question the facts are as follows:

The sale took place March 26, 1884, and was for the then full and liberal market value of the property. The complainant knew of the advertisement at least sixteen days before, as is shown by her letter to the trustee, at page 9 of the record, and she herself produced and filed with the auditor the evidence of the sale under the reference of November 13, 1884 (Record, p. 329). She neither then nor at any subsequent time prior to the filing of this bill November 6, 1890, questioned the regularity of the sale or the sufficiency of the price realized through it or dissatisfaction with it in any particular, but, on the contrary, as shown under the preceding head, made it in part the basis of the claims put forward by her from that time until the opinion of this court in November, 1887; nor when all the claims set up by her in the then pending suit had been conclusively and finally determined against her by that opinion did she then give any notice of dissatisfaction with the sale. The "boom" in G Street property had not then commenced (Stellwagen, Record, p. 196). It was not until 1890, when that unanticipated and remarkable rise in values had increased the worth of the property from about $30,000 to nearly $200,000, that the appellant manifested her first disposition to question the sale by the filing of this bill, which, as here presented, all the other grounds of relief being abandoned,

asks the court, upon a ground wholly barren of any colorable claim of equity, to compel the appellees to accept the then money value of the ground and allow her the exclusive benefit of its enhanced value, in spite of the fact, shown by the testimony, that the appellees or their ancestor could have purchased any one of a score or more of other properties upon either F or G street at the time and at a similar price, and which properties would today have been worth as much as that in controversy here.

Not only so, but she further requires the appellees to go into an accounting of all receipts and disbursements for the long intervening period, a part of them occurring in the lifetime of their ancestor, now deceased, and, in effect, to give her the benefit of the increased rentals during all the period of time in question, embarrassed as such an accounting presumptively must be through the loss or non-preservation of books, vouchers, and the like during a portion of the time at which neither the appellees nor their ancestor had any reason to suppose an accounting would ever be called for.

That an explanation of her delay was necessary under the well-settled rules of this court, the appellant well understood, and it must be presumed that she complied with this indispensable condition of a successful application to the court at this time to the fullest extent that she was able in the excuses given in her bill. These excuses (Record, p. 11), namely, that she had been engaged in such protracted and harassing litigation, accompanied by such an amount of expense that she had "been obliged to be very economical because of the embarrassed condition of her estate," are put in issue by the answer (Record, p. 25), which alleges that the complainant is possessed of large wealth; that the reasons assigned for the delay are neither true in fact nor sufficient in law, and that the real reason of the suit is the fact that an unexpected and unprecedented rise in real-

estate values in the locality of the property had commenced some two or three years prior to the filing of the bill.

As has already been pointed out, no serious attempt to prove that the delay was occasioned by the causes assigned, or that those causes, in fact, existed, is made in the evidence. Indeed, since a mere petition in the then pending cause, bringing to the court's attention the fact that the trustee was about to sell, notwithstanding the alleged existence of a receivership or a petition after the sale setting up the grounds of objection contained in her present bill, or an application to this court such as was made in Goddard *vs.* Ordway, was all that was necessary, and would have been accompanied with practically no expense, the insufficient character of the explanations offered is manifest. On the contrary, as also above stated, the appellant, by the character of the litigation thereafter prosecuted by her, gave the appellees the strongest evidence of her acquiescence of the sale and the absence of objection to it.

That such delay, with full knowledge of all the facts and protracted until there had been a most material change in values, is a bar to relief in a court of equity, is a rule too often illustrated in this court to require any extended citation of authorities.

Some citations are given in the opposing brief as supporting a claim that the analogy of the 20 years' statutory bar at law is applicable, and that, in a suit affecting real estate, the rule of laches will not preclude relief until the expiration of that period. Few, if any, of the authorities in question, it is believed, really involve the proposition contended for. If they do, however, they are at variance with the decisions of this court.

The same objection was made in Mackall *vs.* Casilear, reported in 137 U. S., at p. 556, but the court held a delay of 12 years fatal, although the controversy related to real estate, and it was a case in which, if the action had been at law, nothing short of 20 years would have constituted a bar.

So, in Miller *vs.* McIntire, 6 Pet., 61, the court declares:

"At all times courts of equity have upon general principles of their own, even where there was no statutory bar, refused relief to stale demands where the party has slept upon his right and acquiesced for a great length of time."

McKnight *vs.* Taylor, 1 How., 161, was an effort to reach real estate before expiration of the 20 years. The court said:

"If, indeed, the suit had been postponed a few months longer, 20 years would have expired, and, in that case, according to the whole current of authorities, the debts in the schedule would all have been presumed to be paid. But we do not found our judgment upon any presumption of payment, *for it is not merely on the presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid to stale demands.*"

In the case last cited the court continues:

"In matters of account, where they are *not* barred by the act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice, when the original transactions have become obscured by time, and the evidence may be lost."

The only question of account, *or of fact*, presented in McKnight *vs.* Taylor was whether a debt of a fixed amount set out in the schedule accompanying a deed of trust remained unpaid. As will be seen, it was very much simpler than an investigation into the rent accounts of a building like that involved in the case at bar, accommodating numerous tenants and involving the production of vouchers for repairs, insurance charges, and the like.

In Godden *vs.* Kimmell, 99 U. S., 201, where the delay had been six years less than the statutory period, the court, in applying the rule, said:

"Questions have arisen in controversies of the kind in question in getting at the truth so as to administer justice with anything like reasonable certainty. That the parties to the original transaction have long since deceased is shown from the proofs in the cause, and it is not improbable that many or all of their clerks or agents may be inaccessible as witnesses, for the same or other reasons, or if living and their attendance as witnesses may be secured, they may not be able to remember anything about the transaction."

"The counsel for the complainants have argued that a court of equity can never give effect to a lapse of time, except in a case where the statute would bar an action at law. * * * But there are many cases in which lapse of time will constitute a bar in equity, though at law the statute would not bar. * * * Where the statute applies, it is binding on a court of equity, but in cases where the statutes do not apply, the court acts upon its own principles" (Lewis *vs.* Baird, 3 McL., pp. 82, 83).

In Brown *vs.* County of Buena Vista, 95 U. S., 157, the court found the statute of limitations of Iowa, where the case originated, inapplicable, but added:

"A court of equity applies the rules of laches according to its own ideas of right and justice. Every case is governed chiefly by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual is a question to be resolved by the sound discretion of the court (*Sullivan vs. Portland and Kennebec Railroad Co.*, 94 U. S., 806)."

So, in Harwood *vs.* Railroad Co., 17 Wall., 78, which was a suit to set aside a foreclosure sale for $25,000 of a railroad property worth $2,000,000, filed nearly five years after the sale, and alleging it to have been procured by collusion and in fraud of the stockholders, the court said:

"We are of opinion, also, that there has been too great delay in initiating this suit, and that no sufficient excuse is given for it. The sale was made 5 years before the commencement of this suit, and it is fairly to be inferred from the bill that the plaintiffs were aware of the proceedings as

they progressed. Their knowledge of the mortgage sale is admitted. The allegation of ignorance is, in general terms, of the fraudulent acts and arrangements. * * * Without reference to any statute of limitations, the courts have adopted the principle that the delay which will defeat the recovery must depend upon the particular circumstances of each case."

In the case at bar the fact that the appellant was aware at the time of all the proceedings and of every fact which she alleges in her bill, except the subsequent increase in value, is not left to fair inference, but is apparent and undisputed.

"Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them" (Speidel *vs.* Henrici, 120 U. S., p. 387).

In Hayward *vs.* National Bank, 96 U. S., 611, a delay of less than four years to redeem valuable stocks sold by a bank, which held them as collateral, to three of its own directors, at private sale, the court said:

"Courts of equity often treat a lapse of time less than that prescribed by the statute of limitations as a presumptive bar, on the ground of 'discouraging stale claims, or gross laches, or unexplained acquiescence in the assertion of an adverse right.' * * * No sufficient reason is given for the delay in suing. His poverty or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights. He must be deemed to have made a final election not to disturb the sale of 1868; and a court of equity should not permit him, under the circumstances, to recall that election. Upon the grounds, then, both of acquiescence and lapse of time, he should be held to have forfeited all right to relief in a court of equity."

The "circumstances" referred to, in the above extract from the opinion, consisted merely of a large advance in the value of the stock. There had been no death of any party

in interest, no questions of accounting were involved, and the poverty or pecuniary embarrassment of the plaintiff seems not to have been disputed. In the case at bar we have stronger grounds for applying the rule, as there is absolutely nothing proven or attempted to be proved in the way of excuse or explanation.

"Length of time necessarily obscures all human evidence, and deprives the party of the means of ascertaining the nature of original transactions. * * * Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but *by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor.*"

Wagner *vs.* Baird, 7 How., 258.

No hindrance, impediment, fraud or concealment of any kind existed in the case at bar.

In Murphy *vs.* Paynter, 1 Dill., 333, to set aside a deed obtained by duress 12 years before, the property remaining in the same grantee, and continued apprehension of personal injury being the cause assigned for delay, the court held the action barred by laches, although declaring that the complainant would probably have been entitled to the relief sought if applied for within a reasonably early period.

It is no answer to this overwhelming weight of authority to cite cases, accompanied by fraud, concealment, or the like, in which relief has been granted after great intervals of time. Such cases furnish no analogy to others in which there was no fraud, concealment, or ignorance.

For a case applying the rule where, as in the case at bar, there had been such changes in value as that to place the parties where they originally were would involve want of equity and injustice to one of them, and presenting an admirable summary of analogous cases in this court, reference

is made to the opinion in Galliher *vs.* Caldwell, 145 U. S., 371–373. The court concludes:

"But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

There are, doubtless, innumerable mortgagors, and vendors as well, of property on G and other streets in the city of Washington and elsewhere, the value of which has greatly enhanced since the divestiture of their titles, who would gladly "ask the privilege of redeeming the property by paying the full amount of the debt secured" or of the purchase-money received; and, we submit, there are few who could do so upon grounds more wanting in any substantial equity than that which the appellant presents in this court.

Reespectfully submitted,

W. D. Davidge, Jr.,
J. J. Darlington,
Solicitors for Appellees.